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No. 387

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In the Supreme Court of the United States

OCTOBER TERM, 1954

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

C. W. VOLLMER & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR PETITIONER IN RESPONSE TO THE COURT'S ORDER OF MAY 9, 1955, SUGGESTING THAT THE ACTION MAY BE MOOT

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The Solicitor General, on behalf of petitioner, respectfully submits that the fact that respondent has completed its part of the work on the waterway improvement project in issue here does not render the controversy moot, and further that this Court not only has jurisdiction to proceed with the determination of the case on the merits, but should do so

in furtherance of the public interest which petitioner represents.

1. This is not a case where the practices sought to be enjoined are not likely to recur as was the situation in *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360. The action there was a suit to enjoin Federal officers from seizing property under a challenged presidential proclamation issued as a temporary wartime measure in 1918. At the time this Court held the case to be moot, hostilities had ended and the property had been returned to its owners.[1] Here, in contrast, we are dealing with a continuing regulatory statute whose constitutionality was long ago upheld by this Court (*United States* v. *Darby*, 312 U. S. 100) and with a defendant who has admittedly no intention of complying with the statute until compelled to do so by a court decision. In this case, therefore, the "cognizable danger of recurrent violations" spoken of in *United States* v. *W. T. Grant Co.*, 345 U. S. 629, at 633, is clearly present.

As the attached affidavit shows,[2] respondent is a going construction firm which has been in business since January 1947 (App., *Infra*). During the past five years, it has had more than a dozen contracts or subcontracts for the performance of earthwork on various waterway projects, many of which have

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[1] Compare *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, No. 28, Oct. Term 1954, decided May 9, 1955, in which an Iowa statute had made it very unlikely that the issue would recur.

[2] The original affidavit has been filed with the Clerk.

been in connection with the Mississippi River and the interrelated Intracoastal Canal System. There is no indication that respondent expects to cease taking such contracts. On the contrary, in its memorandum of May 10, 1955, on the mootness point, respondent frankly asserts its intention to continue to bid on them. There is thus every reason to believe that respondent will engage in work similar to that which gave rise to this litigation. And it is virtually certain, unless the decision below is reversed, that violations of the Act will recur when this happens. Respondent has never expressed, or even intimated, an intent to comply with the Act. On the contrary, it has steadfastly maintained that compliance is not required of it.

This case is thus similar to *Carpenters Union* v. *Labor Board*, 341 U. S. 707, 715, in which it was held that the case had not been rendered moot by the completion of the construction project which gave rise to the litigation. Here, as there, though the challenged practices occurred in the performance of a contract which has since been completed, these practices are merely "a sample of what might be repeated elsewhere if not prohibited."

This situation also closely resembles *Walling* v. *Haile Gold Mines*, 136 F. 2d 102 (C. A. 4) and *Tobin* v. *Ramey*, 205 F. 2d 606, rehearing denied 208 F. 2d 505 (C. A. 5), certiorari denied, 346 U. S. 925, in both of which cases, despite claims of mootness, the appellate court reversed the denial of relief in actions under the Fair Labor Standards Act. In the *Haile* case it was claimed that the case

was moot because the employer's gold mine had been dismantled and closed down indefinitely during the War. The Fourth Circuit, reversing the trial court's denial of relief on the merits, said:

> It is familiar law that the discontinuation of an illegal practice by a defendant (either by going out of business or otherwise) after the institution of legal proceedings against the defendant by a public agency, does not render the controversy moot. * * * Nor is a case rendered moot where there is a need for the determination of a question of law to serve as a guide to the public agency which may be called upon to act again in the same matter. * * * The possibility of future violations of the Act by Haile is very much with us and not merely within the realm of prophecy. Moreover, an adjudication on the merits by us at this time will finally resolve the instant dispute and obviate the need for, and the expense of, repetitious litigation in the future if, as, and when Haile resumes mining operations [136 F. 2d at 105]

Similarly in *Tobin* v. *Ramey*, the Fifth Circuit reversed the trial court on the merits of the coverage issue, and rejected the employer's claim that the case was moot because he had completed the particular levee project there involved and had sold his equipment and had no present intention of bidding on similar contracts. The instant case is even stronger than *Ramey* since respondent is con-

tinuing in business and has definitely advanced its intention to bid on similar contracts.

Clearly, therefore, particularly in view of the public interest which petitioner represents, the case falls within the principles of this Court's decisions which are succinctly summarized in the *W. T. Grant* case:

> * * * [The] voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i. e.*, does not make the case moot. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897); *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37 (1944); *Hecht Co.* v. *Bowles*, 321 U. S. 321 (1944). A controversy may remain to be settled in such circumstances. *United States* v. *Aluminum Co. of America*, 147 F. 2d 416, 448 (1945), *e. g.*, a dispute over the legality of the challenged practices. *Walling* v. *Helmerich & Payne, Inc., supra; Carpenters Union* v. *Labor Board*, 341 U. S. 707, 715 (1951). The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. * * * [345 U. S. at 632].

2. Even if respondent were not a going construction firm with every intention of performing other work on waterway improvement projects, it would not follow that the action or the issues would be moot. *Walling* v. *James V. Reuter, Inc.*, 321 U. S.

67; see also *Mitchell* v. *Joyce Agency, Inc.*, 348 U. S. 945; *United States* v. *W. T. Grant Co., supra.* In the *Reuter* case, this Court held that even the dissolution of the corporation sought to be enjoined under the Fair Labor Standards Act does not render the action moot. "The validity of the judgment in such a case", said the Court, "survives the dissolution of the corporation defendant. * * * And these principles may be applied in fuller measure in furtherance of the public interest, which here the petitioner represents, than if only private interest were involved" (*Id.*, at 674- 675).

There are special reasons why mere completion of a particular construction project should not be held to moot the issue of the applicability of a Federal regulatory statute such as the Fair Labor Standards Act. The nature of the construction industry is such that it would be virtually immune from enforcement proceedings if litigation must be completed before the completion of a particular construction job, since the majority of construction contracts are completed within a relatively short period of time. Governmental enforcement procedure and litigation, by contrast, is necessarily a rather protracted process. Not only is there usually a lapse of time before violations are brought to the attention of the enforcement agency, but time must be taken to investigate, and in most cases to negotiate for voluntary compliance. This is in addition to the time consumed in taking the necessary steps to prepare the case for legal action, and even further delay is often encountered be-

cause of the crowded condition of many court dockets and of course the delay necessarily incident to appellate review.[3] Thus a holding that litigation is mooted upon completion of the particular construction job out of which the violations arose would frustrate enforcement proceedings and make it almost impossible for the Government ever to secure authoritative determination of the Act's applicability to this type of work.

Whether the Act does apply to work similar to that involved here is a question of great importance not only to petitioner but to the entire construction industry as well. As pointed out in the petition for certiorari, Congress has authorized hundreds of waterway improvement projects and appropriated huge sums of money for their prosecution. Work on waterway projects, however, is usually undertaken by more than one contractor, and the various contractors, as a general rule, complete their part of the work in relatively short periods of time. It is important that there be an authoritative determination of the issue whether the Act applies in

[3] The present case is a good illustration of the problem. The violations alleged to have occurred in the case were found on an investigation made four months after respondent commenced work upon the project. Negotiations toward voluntary compliance were conducted with respondent's legal counsel over a period of approximately five more months. Finally, after respondent's insistence that the Act was inapplicable, a complaint was filed on December 5, 1951. Trial upon the issues, however, was not reached on the court docket until some eighteen months later. During all but about five months of the time the case was pending trial on the district court docket, respondent was still engaged in work upon the Algiers project.

this large area of employment. This case, which squarely presents the issue and which has already been fully briefed and argued in this Court, seems the most appropriate vehicle for such determination. Cf. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 515-516.

Respectfully submitted,

SIMON E. SOBELOFF,
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Washington, D. C.

MAY, 1955.

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 387

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

C. W. VOLLMER & COMPANY, INC., RESPONDENT

AFFIDAVIT

STATE OF TEXAS,
County of Dallas.

Earl Street, being duly sworn, deposes and says that he is, and at all times during the pendency of the above styled cause has been, employed by the United States Department of Labor as Regional Attorney at Dallas, Texas, and upon information and belief further says that:

(1) Respondent C. W. Vollmer & Company, Inc., was incorporated under the laws of the State of Texas by charter issued by the Secretary of State of the State of Texas on January 4, 1947. Since that date it has been and is engaged in the construction business, including construction in connection with heavy engineering projects and utility projections.

(2) On September 13, 1949, respondent was issued a permit to do business in the State of Louisiana by the Secretary of State and since that date it has been and is engaged in the type of business hereinafter shown.

Respondent has and maintains a field office located at Peters Road, Harvey, Louisiana, at which it maintains an office, shop and various equipment. Respondent's name is listed in the advertising section of the telephone directory under the heading "Contractors, Excavating and General Contracting."

Respondent and its employees have performed work in connection with the following contracts:

(a) Contract No. DA-16-047-eng-1508. Furnishing earth work to strengthen and rebuild an existing levee on the Mississippi River north of the City of New Orleans at what is known as Deer Ranch, Harlem and Lower Harlem Levees. Work period—November 24, 1951 to January 1, 1952.

(b) Contract No. DA-16-047-eng-1754. Earth work including the grading, strengthening and rebuilding of existing levees known as Empire Levee and Orange Farm Levee on the Mississippi River about twenty miles south of the City of New Orleans. Work period—October 14, 1952, to December 22, 1952.

(c) Contract No. DA-16-047-eng-2724. As subcontractor under Atlas Construction Company at Vidalia, Louisiana, stock-piling of materials consisting of sand, gravel and soil for the closure of Bayou Boeuf, a part of the Bayou Boeuf lock ap-

proach channel of the Atchafalaya River basin. This river is a navigable stream and the work was to aid navigation and for flood control. Work period—March 21, 1954 to May 30, 1954.

(d) Contract No. DA-16-047-eng-1856. As subcontractor under Keller Construction Company, New Orleans, Louisiana. Work consisted of supplying of sub-surface material, principally earth work for construction of a pumping station known as Orleans-Plaquemine Station, located at the conjunction of the Mississippi River and the Intracoastal Canal, part of the Algiers Lock project. Work period—July 24, 1952 to June 16, 1954.

(e) Contract No. DA-16-047-eng-1856. As subcontractor under Keller Construction Company; work in connection with the construction of a pumping station known as Orleans Parish Pumping Station erected to relieve the overflow of water occasioned by the Algiers Lock Project. Work period—August 15, 1952 to June 9, 1954.

(f) Contract No. DA-22-052-eng-3281. Work consisted of clearing the Grenada Reservoir site on the Yalabusha River in Mississippi. Yalabusha River is a tributary of the Yazoo River which flows into the Mississippi River near Vicksburg. Work period—May 1, 1952 to September 18, 1953.

(g) Contract No. DA-22-052-eng-4115. Construction of a new levee on the back waters of Red River from Dumbarton to Lake St. John. Work period—July 22, 1953 to October 1, 1954.

(h) Contract No. DA-22-052-eng-4792. Construction of a levee on the Red River back water

for the Buckner Bayou Diversion for flood control. Work began October 13, 1954 and not yet completed.

(i) Contract No. Noy-71-470. Construction of a magazine at the Naval Ammunition Depot at Shumaker, Arkansas. Work period—March 31, 1952 to July 6, 1953.

(j) Contract No. Noy-71-471. Construction of a magazine at the Naval Ammunition Depot at Shumaker, Arkansas. Work period—March 31, 1952 to July 6, 1953.

(k) Contract with Board of Levee Commissioners of the Orleans Levee District, New Orleans, Louisiana, for the topping of approximately 1,000 ft. of levee at Nestor Canal and the construction of approximately 1,000 ft. of wooden revetment, all in what is called Bohemia Spillway in Plaquemine Parish, Louisiana, for the control of Mississippi River flood water. Work period—December 20, 1949 to January 31, 1951.

(l) Contract with Board of Levee Commissioners of Orleans Levee District, New Orleans, Louisiana, for topping sections of levee between Bayou Lomoque and Ostrica for the building of a revetment at Ostrica and the raising and repairing of the revetment at Tabony Pass, in the Bohemia Spillway area for the control of Mississippi River flood waters. Work period—November 29, 1950 to March 15, 1951.

(m) Contract with the Board of Levee Commissioners of the Orleans Levee District, New Orleans, Louisiana, for the construction of approximately

53,000 cubic yards of earthen levee and approximately 1,250 lineal feet of wooden bulkhead in the vicinity of the Higgins Plant at Michaud, Louisiana, on a stream which is part of the Intracoastal Canal System. Work period—April 9, 1951 to September 10, 1951.

(n) Contract with the Board of Levee Commissioners of the Orleans Levee District, New Orleans, Louisiana, for the re-shaping of approximately 25,350 lineal feet of earthen levee on the north bank of the Intracoastal Canal from the Industrial Canal to Paris Road in the City of New Orleans. Work period—April 23, 1951 to September 22, 1951.

(o) Contract with the Board of Levee Commissioners of the Orleans Levee District, New Orleans, Louisiana, for the topping of the Florida Avenue Canal Levee, a part of the drainage system of the City of New Orleans, from the pumping station to Fisherman's Canal. Work period—January 2, 1953 to April 11, 1953.

(p) Contract with the Board of Levee Commissioners of the Orleans Levee District, New Orleans, Louisiana, for enlarging and reshaping of approximtaely 44,000 lineal feet of levee in the Third Levee District on the Intracoastal Canal from the Industrial Canal to the Higgins Plant at Michaud, Louisiana. Work period—Began September 7, 1954, scheduled to have been completed March 19, 1955.

(3) On this, the 10th day of May, 1955, there was received in the office of the Wage and Hour and

Public Contracts Divisions at New Orleans, Louisiana, a letter postmarked April 29, 1955 at Ferriday, Louisiana, which letter is in substance as follows:

"Ferriday, Louisiana
April 27, 1954 [Sic]

Mr. Williamson
Representative Wage and Hour Division
United States Dept. of Labor
Alexandria, La.

Mr. Williamson:

I am writing you to find out about working hours per week. I thought it was a law to not work over 40 hours per week and all over 40 hours a week was time and a half. On other drainage jobs I worked on I got time and half over 40 hours a week. I have been working for this contractor since November 1954 working 56 hours a week with no overtime. I have my check stubs to prove this and so has everyone else on this job. We all feel we should be getting overtime. They say that this job don't have to pay overtime unless you work over 8 hours a day. If that's the case, why does everyone else pay overtime. Would like for you to answer my letter explaining to me why we don't get overtime. I work for C. W. Vollmer, Clayton, Louisiana. The drainage job is here at Ferriday, Louisiana. He shouldn't be no exception. If you have doubt to what I told you, ask any man on the job and there is plenty work. We all have our check stubs to prove it. I am going to give you my name and

address. I don't want my name mentioned. Thank you.

Yours truly,

(Signature and address deleted)."

(S.) EARL STREET,
Regional Attorney.

Subscribed and sworn to before me, the undersigned authority in my aforesaid jurisdiction, on this the 10th day of May, 1955.

(S.) KATHERINE LAIN,
[SEAL.] *Notary Public.*
My Commission expires: June 1, 1955.

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